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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF OF APPELLEES

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FACTUAL STATEMENT

In 1972 the Alaska Legislature passed an Act entitled "Local Hire Under State Leases" (hereinafter referred to as "Local Hire" or "the Act"),[1] which is the subject

[1] AS 38.40.

of this suit. The first two sections of the Act set out the Legislature's policy and purpose in these terms:

> Sec. 38.40.010. STATE POLICY. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resources management.
>
> Sec. 38.40.020. LEGISLATIVE FINDINGS. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are non-recurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state.

The Legislature effected this stated policy and purpose by requiring that State granted oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any renegotiation of any of these contain a requirement that qualified Alaska residents be given a preference in employment arising out of activities generated as a result of the leases, easements, etc.

This suit was initiated by the appellants, none of whom were residents as that term was defined in AS 38.40.090, claiming that Local Hire violated their rights

under the equal protection clause of the 14th Amendment to the United States Constitution and under the privileges and immunities clause of Article IV, Section 2 of the Constitution. The trial court upheld the constitutionality of the Act in its entirety, including a one-year durational residency requirement initially contained in the law. Appellants then perfected their appeal to the Alaska Supreme Court. In its June 3, 1977 opinion, reported at 565 P.2d 159, the Alaska Court struck the law's one-year durational requirement but found that the underlying resident preference was a proper and valid exercise of the State's power: "[t]he natural resources of Alaska 'belong' to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not." *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 17a; 565 P.2d 159, 168-169. The natural resources to which the Alaska Court referred, of course, are those which Alaska owns in the true legal sense. It was not speaking in the more general sense of those natural resources which may be found within the borders of Alaska, irrespective of who has legal title to them.[2]

This appeal followed.

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[2]This latter useage seems to be the more common. *See*, West v. Kansas Natural Gas, 221 U.S. 229 (1911) and Pennsylvania v. West Virginia, 262 U.S. 553 (1923). In both these cases, a state tried to regulate for local use gas which was found and recovered within its borders, but which it did not own. In spite of the fact that the state did not have any ownership rights with respect to the gas, both opinions speak generally of "Oklahoma's gas" and "West Virginia's gas". See also the discussion in *West* at 255 and quoted by appellants at p. 29 of their brief which speaks of "Pennsylvania's coal", the "Northwest's timber" and the "mining states' minerals". Aside from the fact that *West* and *Pennsylvania* were commerce clause cases, this difference in useage is what renders those cases wholly distinguishable and irrelevant to a constitutional analysis of Local Hire.

SUMMARY OF ARGUMENT

The only challenges to Local Hire which are properly before this Court are appellants' claims that the Act violates the privileges and immunities clause of Article IV, Section 2 of the United States Constitution and the equal protection clause of the 14th Amendment to that Constitution.

As to the Article IV, Section 2 claim, *McCready v. Virginia*, 94 U.S. 391 (1877) states the applicable principle. That case holds that the privileges and immunities clause does not apply to decisions by the states of how the resources which they own are to be used and distributed. *McCready* has never been limited in any relevant manner, and it has never been overruled. A number of more recent cases, such as *Toomer v. Witsell*, 334 U.S. 383 (1948), have rejected expanding the *McCready* principle to encompass state claims of "ownership" based on the fictional common law doctrine that title to *ferae naturae* is in the sovereign. *McCready*, however, involved land owned by Virginia. Local Hire represents a decision by the State of Alaska as to how, if at all, the land and resources which it owns are to be used. The challenged Act therefore falls within the *McCready* principle.

However, even if the *McCready* principle does not encompass Local Hire, the Act still comports with the privileges and immunities clause. There are valid independent reasons for Alaska's adoption of Local Hire, and the degree of discrimination effected by the Act bears an extremely close relation to those reasons. Alaska is using Local Hire as a means of reducing unemployment and upgrading its "human resources." The Act is one of the means Alaska has chosen to carry out both its general duty as a State to provide for the welfare of its people and its specific duty under the

Alaska Constitution to utilize its resources for the maximum benefit of all Alaskans.

Commerce clause cases relied upon by appellants lend no support in attacking either the *McCready* principle or Local Hire. Those decisions all involved state attempts to restrict the flow of a product in interstate commerce and are therefore wholly distinguishable. Local Hire addresses only employment arising out of certain oil and gas-related activities and places no restriction on the use or distribution of the oil and gas. If Alaska's employment preference for residents in certain state-generated activities creates an impermissible "Balkanization" of our Nation, then the many resident preferences in employment arising out of public contracts required by other states are also impermissible.

With respect to appellants' suggestions that Local Hire be subjected to the strict scrutiny test under the equal protection clause of the 14th Amendment, there is neither precedent nor rational justification for doing so. Classifications based on residence/non-residence have been approved frequently by the Court without applying strict scrutiny. The fact that classifications discriminating against *alien residents* of a state are treated as "suspect" provides no basis for treating classifications based on non-residency as "suspect" for purposes of equal protection analysis. This Court has never held that non-residency is a "suspect classification."

Appellants' claim that Local Hire violates a non-resident's fundamental right to interstate travel is equally without precedent. That claim is apparently based on a misunderstanding of the nature of the right to travel which this Court has found to be "fundamental" for purposes of equal protection analysis. The

Constitution protects two different rights to travel. The first, the right to travel casually or to move about, is protected by the privileges and immunities clause of Article IV, Section 2. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). The second is the right to migrate – to move one's domicile from one state and resettle in another. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). Because a change in domicile means a change in state citizenship, Article IV, Section 2 does not reach that right, and it is therefore protected by the 14th Amendment. While both rights of travel have been described as "fundamental," only the right to migrate is treated as "fundamental" for purposes of invoking strict scrutiny. The number of rights viewed as "fundamental" under the equal protection clause is quite limited, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), whereas all rights protected by the privileges and immunities clause are described as "fundamental" in cases involving Article IV, Section 2. *Corfield v. Coryell*, 4 Wash. C.C. 271, 6 F.Cas. (C.C.E.D. Pa. 1825). This Court has never said the right to travel casually while retaining one's domicile in one state is a "fundamental right" calling for strict scrutiny under the equal protection clause.

ARGUMENT

I.

ALASKA HAS A DIRECT CONTRACTUAL NEXUS WITH THE EMPLOYMENT COVERED BY LOCAL HIRE.

It is essential at the outset to keep clear what this Act involves. Local Hire does not apply to all private employment in the state; it does not even apply to all private oil and gas employment in the state. It applies *only* to that oil and gas-related employment which arises from "oil and gas leases, easements, or right-of-

way permits for oil or gas pipeline purposes, unitization agreements or renegotiation of any of the preceding *to which the state is a party* after July 7, 1972." AS 38.40.050(a) (emphasis added). The State, then, must have a direct proprietary and contractual nexus to the covered employment. The provisions of AS 38.40 come into operation only when the State grants a leasehold or similar interest in land which it owns.[3]

Application of the Act is further conditioned as follows:

> [T]he activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor. AS 38.40.050(a)

Finally, Local Hire does not even bar non-residents from that employment which is subject to the Act. The Act only requires that Alaska residents who are

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[3]At the time of Statehood on January 3, 1959, approximately 99% of all land within the borders of Alaska was owned by the federal government. In becoming a state, Alaska was granted and became entitled to select, under the provisions of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 399, Sec. 6, nearly 103,000,000 acres of those federal lands (approximately one third of the total federal holdings). The purpose of those land grants was to serve Alaska's overall economic and social well-being. *Udall v. Kalerack*, 396 F.2d 746 (9th Cir., 1968). See also House Report No. 624, "Alaska – Admission into Union", 1958 U.S. Code. Cong. & Adm. News 2933-2956. The selection process is not yet complete, but since 1959 large portions of land have been conveyed to the State, in fee, by the federal government; full title to those lands and the minerals and other resources on and below them is vested in the State.

available and qualified to do the work be hired before non-residents. AS 38.40.030(b). The Act imposes no penalty for coming to Alaska. In fact, as to those who consider exercising their constitutional right to inter-state migration by traveling to Alaska and taking up residence, it provides a clear incentive. However, the Act does not guarantee anyone that they will get a job. At best, Local Hire provides only an inchoate expectation of employment in activities which are the result of public oil and gas leases.

II.

ALASKA MAY ADOPT LOCAL HIRE LEGISLATION TO FOSTER THE WELFARE OF ITS RESIDENTS.

A. Alaska Has A Duty To Provide For The Welfare Of Its Residents.

Despite the fears of appellants that, if Local Hire is upheld, "Balkanization" of our great Nation is imminent,[4] we must point out that the United States is not one large state. Rather, it is a union of independent and sovereign states, each with full power and authority to conduct and regulate its internal affairs, consistently, of course, with those powers vested in the federal

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[4]If the inevitable result of certain employment preferences for residents is "Balkanization", then surely the resident preferences created by numerous states for employment by private contractors on public construction and/or procurement activities already must have led to such a condition. Most of those laws have been in existence for quite some time. See for example, Alabama §39-3-2; Arizona §34-302; Arkansas §14-607; Colorado §8-17-102; Delaware 29 §6913; Idaho §44-1001; Illinois 48 §271; Massachusetts 149 §26; Montana §41-701; New Jersey §34:9-2; New Mexico §5-1-5; New York Labor Laws §222; Oklahoma 61 §10; Pennsylvania 43 §154; Nevada §338.130; South Carolina §1-1-460; South Dakota §5-19-5 and 5-19-6; Washington RCW 39.16.005. This listing represents a casual search of available statutes and is not exhaustive.

government by the Constitution. This is our system of federalism,[5] founded as it is on "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

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[5]The nature of our "system of federalism" is probably open to some debate. We think it can be fairly said that the concept of federalism, as reflected by this Court's approach to the balance of federal vs. state authority since the adoption of the Constitution, has undergone some fluctuations. This Court only last year indicated this balance – this federalism – is largely one of policy. Douglas v. Seacoast Products, Inc., ____ U.S. ____, 52 L.Ed.2d 304, 320 (1977). Two other recent decisions of this Court lead us to the conclusion that our system of federalism as currently outlined by the Court recognizes a relatively broad scope of authority in the states, restricted only by the clear grants of power to the federal government by the Constitution and by the limitations on state action contained in the Constitution. National League of Cities v. Usery, 426 U.S. 833 (1976); Hughes v. Alexandria Scrap Corporation, 426 U.S. 794 (1976).

Contrary to appellants' conclusions on the subject, Appellants' Brief, p. 12, n. 7, the concept of federalism as it was initially reflected in the new Constitution led to considerable debate before that document was finally ratified. After the Framers adopted and signed the Constitution it was presented in each state to a convention of delegates for ratification on behalf of that state. All thirteen states eventually ratified the Constitution. However, seven of them (in the order of ratification: Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina and Rhode Island, see Hunt and Scott, "Debates in the Federal Convention of 1787 reported by James Madison", Oxford Press (1970)) included as a formal part of their ratification document a "recommendation", "declaration" or "proposal" expressing their view that the Constitution should not be read as implying that Congress had any powers beyond those specifically enumerated and that all other powers not expressly relinquished by them and vested in the federal government through the Constitution were reserved to the states.

[footnote continued]

In 1837, this Court described the authority and duty of the states as follows:

> We . . . plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered to or restrained by the Constitution of the United States. That, by virtue

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Clearly, there was considerable concern on the part of the states which had undertaken to create this Union that, as drafted, the Constitution would be interpreted as denying to them powers which they felt should be retained, even under one national government. In response to those concerns, the First Congress proposed twelve amendments to the Constitution. The resolution submitting the amendments began as follows:

> The Convention of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the benificent ends of its institutions:

Id. The twelfth proposed amendment read:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Id. That proposal, of course, was adopted as the Tenth Amendment to the Constitution. The adoption of this and the other 10 original amendments to the Constitution has been characterized by this Court, through Mr. Justice Miller, as showing "a prevailing sense of danger at that time from the federal power." Slaughterhouse Cases, 16 Wall. (83 U.S.) 394, 410 (1873). It is for these historical reasons that Constitutional challenges to the exercise of state authority must always be evaluated in conjunction with the Tenth Amendment. Toomer v. Witsell, 334 U.S. 385, 407 (1948) (Frankfurter, J., concurring). See, also San Antonio Independent School District v. Rodriguez, *supra*, at 44.

> of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation or what may, perhaps more properly be called internal policie, are not thus surrendered or restrained; and that, consequently, in relation to these the authority of a State is complete, unqualified and exclusive. *The Mayor of the City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 104.

In 1884, Mr. Justice Field, speaking for this Court on the effect of the 14th Amendment on matters within a State's sovereignty, said:

> But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and the good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity, *Barbier v. Connolly*, 113 U.S. 27, 28 L.Ed. 923, 925.

These precepts have not diminished over the intervening years:

> *The state has a duty to all its lawful residents*, resident alien or citizen. It must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the Bar, and that they have equal

> access to private employment. *Truax v. Raich, supra. Its duty to reduce unemployment* is as much a duty to the alien as to the citizen . . . *C.D.R. Enterprises, Ltd. v. Board of Education*, 412 F. Supp. 1164, 1170 (1976), *aff'd mem. sub nom. Lefkowitz v. C.D.R. Enterprises, Ltd.*, ____ U.S. ____, 50 L.Ed.2d 742 (1977) (emphasis added)[6]

But in addition to the general duty imposed on it as one of the several states within our federal system, the Alaska Legislature has an expressly stated constitutional duty to assure that its natural resources are developed and utilized for the benefit of its people:

> The legislature shall provide for the utilization, development, and conservation of all natural resources *belonging to the State*, including land and water, *for the maximum benefit of its people.* Alaska Const., Art. VIII, §2 (emphasis added)

Alaska, then, has the dual obligation to provide for the welfare of its residents and to develop its natural resources for the benefit of Alaskans. Local Hire is directed toward satisfying both of those obligations.[7]

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[6]In *C.D.R. Enterprises*, New York State carried out its "duty to reduce unemployment" by requiring that New York residents be given a preference in employment on public construction projects. The federal district court upheld the validity of that preference once the law's exclusion of aliens who were residents of New York was struck. This Court affirmed that decision without opinion.

[7]Appellants have yet to assert that the State has no duty to provide for the welfare of its residents, or that it may not effect this duty by discriminating in their favor.

B. The Alaska Legislature Has Performed Its Duty, In Part, By Adoption Of Local Hire Legislation.

Implicit in the Alaska Legislature's duty to provide for the welfare of the State's people must be the authority to implement programs to meet that duty. AS 38.40.010 and 38.40.020, set out in full at p. 2, express the Legislature's stated policy and reasons for adopting Local Hire. From these provisions it can be seen that the State sought to guarantee that the land it owned and the natural resources on and below it, as the common property of its people, would be developed and used to provide the maximum benefit and return to those people. Accomplishing this purpose meant more than simply building new schools and highways with gas and oil-generated tax receipts and royalty rights. It included, as well, assuring that the State's natural resources (those which it owns) are similarly utilized, if at all,[8] in the interest of its people, individually and collectively, toward the end of benefiting Alaska's society and economy overall – "reducing unemployment and 'upgrading Alaska's human resources'."[9]

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[8]As to natural resources owned by the State, the *only* group which could require that any State-owned resources be developed is the Alaskan people. Notwithstanding appellants' reference in their brief at p. 19 to the Alaska Natural Gas Transporation Act of 1976, 15 U.S.C. 719, Alaska is the exclusive owner of all minerals on or below lands owned by her until such time as she leases those lands for development and extraction of those minerals.

[9]The Alaska Supreme Court has said that "reducing unemployment and 'upgrading Alaska's human resources' " is a compelling governmental interest for purposes of the equal protection strict scrutiny test. State v. Wylie, 516 P.2d 142, 149-150 (1973). Despite the existence of such an interest in that

[footnote continued]

Despite the clear language of the Act, however, appellants have yet to focus properly on the application and effect of Local Hire. They place heavy reliance on three commerce clause decisions dealing with the efforts of certain other states to restrict the availability of natural resources produced within those states, *West v. Kansas Natural Gas, supra; Pennsylvania v. West Virginia, supra;* and *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1925). The attempted state action in those cases, however, bears no resemblance to Local Hire. Alaska's Act places no restriction on the product or its transportation; it deals only with employment. Further, Local Hire applies only to oil and gas-related property owned, in a proprietary sense, by the State of Alaska and not, as was the case in *West* and *Pennsylvania,* to all natural resources of a specific kind (natural gas) within the state's borders, publicly or privately held. Finally, the Act establishes the resident employment preference provisions as a necessary condition of any oil and gas lease, right-of-way permit, or the like granted by the State.

The State's nexus with the subject matter it is regulating is, therefore, very real and direct. It arises

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case, however, it struck the one-year durational residence requirement imposed by the State for purposes of an employment preference in State hiring on the grounds that the one-year requirement was not sufficiently tailored to accomplish the valid interest. The Court below followed the same approach in invalidating the one-year durational requirement originally adopted as a part of the Local Hire Act. Contrary to appellants' apparent position at page 7, n. 7 of their brief that the Alaska Court rejected characterizing Local Hire as an attempt to solve social, racial, educational, and economic problems, the Court did not do so. It merely stated that it saw no need to characterize the Act's purpose since the principle on which it relied in upholding the Act did not require such a finding.

out of *ownership* and is not based simply on some general attribute of sovereignty authorizing the State to exercise control over the business decisions of private employers or the resources found within its borders. The proposition that a state may regulate the use of the resources which it, on behalf of its people, owns was clearly acknowledged by this Court in *Truax v. Raich*, 239 U.S. 33 (1915). In that decision – which struck down, as a denial of equal protection to resident aliens, an Arizona statute which required that *all* private employers of five or more workers employ at least 80 per cent United States citizens – Mr. Justice Hughes, speaking for the Court, said:

> The discrimination defined by the Act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states.

Id. pp. 39, 40.[10] The Arizona law lacked the necessary nexus to permit that state to regulate, across the board, the composition of the workforce in the private sector. Local Hire is grounded upon precisely that necessary nexus found absent in *Truax.*

Appellants ignore the fact that the resident preference to which they so strongly object applies only to

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[10]Recent decisions of this Court treating alienage as a suspect classification for purposes of equal protection analysis, *e.g.*, C.D.R. Enterprises, Ltd. v. Board of Education, *supra;* Examining Board v. Flores de Otero, 426 U.S. 572 (1976); Sugarman v. Dougall, 413 U.S. 634 (1976), cast substantial doubt on the continuing validity of this holding as it applied to aliens who were residents of Arizona. However, the underlying proposition that a state may limit the "enjoyment" of its resources to its people has yet to be rejected.

employment opportunities which would not even exist were it not for the State's granting oil and gas leases and pipeline rights-of-way. In a very real sense this is employment which owes its very existence to the State. As such, it is on exactly the same footing, constitutionally, as residence requirements in public employment and public construction contracts. *E.g.*, *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976);[11] *C.D.R. Enterprises, Ltd. v. Board of Education, supra*; and n. 4, *ante*.

Local Hire does no more than limit the distribution of the State's resources and property (those which it owns) and interests in them in a manner which is designed to assure maximum "enjoyment" to Alaskans.

III.

LOCAL HIRE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.

The privileges and immunities clause of Article IV, Section 2 of the United States Constitution does not apply, and was never intended to apply, to decisions by a state as to how it would permit, if at all, the use and distribution of the natural resources to which it has title. As we shall show, nothing in appellants' brief undercuts, in any way, the validity and vitality of that proposition, and the employment preference under Local Hire is fully within its scope.

However, even if the regulation by a state of *employment arising out of* the use of its natural resources is not a proper adjunct of the state's power to

[11] *McCarthy* did not involve simply a resident *preference* in employment. Philadelphia required residency as a *condition* of continuing, as well as initial, employment.

regulate and control those resources, it must still be shown that the Act involves a "fundamental" privilege or immunity as that term is used in privileges and immunities analysis. Additionally, even if that can be shown, appellants must still demonstrate that there are no valid reasons for the discrimination and that, even if the reasons are valid, the discrimination does not bear a close relation to those reasons. Appellants cannot make such a showing – they have not even attempted it.

A. *McCready v. Virginia* Has Never Been Overruled. The Principle It Upholds Is Still The Law Of The Land.

In upholding Local Hire against appellants' attack under the privileges and immunities clause, the Alaska Supreme Court stated that it was relying on the "natural resources exception" to the clause recognized by this Court in *McCready v. Virginia, supra*. The Court reasoned as follows:

> *McCready v. Virginia, supra*, has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to the decision of this case. Article VIII, Section 2 of the Alaska Constitution, stating that Alaska's natural resources shall be used and developed in ways that will benefit Alaska's people, is not inconsistent with the privileges and immunities clause. The natural resources of Alaska "belong" to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Op., Appendix I, Appellants' Jurisdictional Statement, pp. 17a; 565 P.2d at 168, 169.

1. The McCready Principle is Still Viable.

McCready involved a privileges and immunities attack on Virginia's restricting solely to its own citizens the use of the land beneath its navigable waters for the purpose of planting and growing oysters. This Court rejected that attack and upheld the Virginia statute, indicating that the privileges and immunities clause had no application to state restrictions which were, "in effect, nothing more than a regulation of the use by the People of their common property." The Court then went on to say:

> [W]e think we may safely hold that the citizens of one state are not invested by this clause of the Constitution with any interest in the common property of the citizens of another state.

Id., p. 396.

In reaching its decision, the Court had looked to the opinion of Mr. Justice Bushrod Washington, while on circuit, in the case of *Corfield v. Coryell, supra*, for his exposition on the scope of the privileges and immunities clause. In a portion of the *Corfield* decision which has been much quoted by this and numerous lower Courts throughout the land, Justice Washington outlined the nature of those privileges and immunities which he considered "fundamental" to the citizens of all free governments.[12] But Mr. Justice Washington's

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[12]It is clear from a reading of *Corfield* and cases decided by this Court since *Corfield* that the "fundamental right" analysis under the privileges and immunities clause encompasses a far broader range of individual rights than those which this Court has described as "fundamental" for purposes of determining whether strict scrutiny is the applicable test for analyzing challenged state action under the equal protection clause of the 14th Amendment. Those rights which are "fundamental" for

[footnote continued]

discourse went beyond the language so oft-quoted by the Courts and now by appellants and conditioned it with the following in the very next paragraph:

> But we cannot accede to the proposition which was insisted on by the counsel that, under this provision of the constitution, [Art. IV, Section 2] the citizens of the several states are permitted to participate in all *the rights* which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.

Id., at 381 (Emphasis in the original.) On the following page, Mr. Justice Washington restated the principle as follows:

> [T]his right is a right of property, vested either in certain individuals, or in the state, for the use of the citizens thereof; it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the state, to the citizens of all the other states.

Id., at 382.

The principle that a state may regulate the use of state property to the advantage of its residents without

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purposes of equal protection analysis are quite limited in number. San Antonio Independent School District v. Rodriguez, *supra*, at 31-39. That this difference in the useage of the term "fundamental right" exists appears to have been missed by both the appellants and the National Legal Right to Work Defense Foundation in its proposed brief *amicus curiae*.

extending similar advantages to the residents of the other states, first articulated by Mr. Justice Washington and later adopted by this Court in *McCready*, has never been overruled or even limited in any manner relevant to Local Hire.[13] The Alaska Supreme Court relied on that principle in this case, and its reliance was both justified and correct. Faced with the clear application of *McCready*, appellants have no choice but to assert that the *McCready* "exception"[14] is no longer good law. In support of that assertion, they point to a number of decisions of this Court which, in their view, indicate that this Court has severely limited, or perhaps even overruled, the principle upon which *McCready* was founded.

[13]As pointed out, *ante*, at n. 10, the Court has in recent years refused to apply the *McCready* principle to state discriminations against aliens who are residents of the state. *Sugarman, supra;* Shapiro v. Thompson, 394 U.S. 618 (1969). Local Hire benefits all Alaska residents, citizen and non-citizen, alike. None of this Court's decisions dealing with alienage indicate in any way that the *McCready* principle is no longer acknowledged.

[14]Although over the years the Court's decision in *McCready* has been regularly described by the Courts and commentators as creating an "exception" to the privileges and immunities clause, it seems to us that the better analysis is to characterize the decision as declaring that the privileges and immunities clause did not apply, and was never meant to apply, to decisions by the states as to how they would permit, if at all, the use and distribution of the natural resources which they own, *i.e.*, the common property of the people of the state. Alternatively, *McCready* can be characterized as stating that sharing in the regulation and distribution of the resources of a given state is not a privilege or immunity of citizens in the several states. This was the approach taken by W.J. Meyers in "Privileges and Immunities of Citizens", 1 Mich. Law Review 286, 298-300 (1903). Under either approach, we suggest that describing the *McCready* principle as an "exception" is not really accurate.

A review of the cases cited by appellants demonstrates that those decisions do not support their position. Most of the cases involved states' attempts to justify their discriminatory actions on the ground of a general claim of "ownership" based on the old common law fiction that the sovereign is the owner of *ferae naturae.* That type of proprietary claim had been recognized by this Court in *Geer v. Connecticut*, 161 U.S. 519 (1896), in spite of a vigorous dissent by Mr. Justice Field arguing that the common law doctrine was insufficient to permit the state to attempt to control the commerce of killed wildfowl "where the state has never had the game in its possession or under its control or use." *Id.*, at 539. This Court then subsequently refused to extend the application of the common law ownership fiction to wild fowl which clearly migrated across both state and national boundaries. *Missouri v. Holland*, 252 U.S. 416 (1920). As expressed by Mr. Justice Holmes in *Missouri*, for a state to rely on a fictional common law claim of title was "to lean upon a slender reed. Wild birds," he said, "are not in the possession of anyone; and possession is the beginning of ownership." *Id.*, at 434.

In *Toomer v. Witsell, supra*, this Court refused to apply the *McCready* principle to South Carolina's claim of ownership of the free-swimming fish in its marginal sea. That state had also relied on the common law "ownership" fiction as the basis for its claim. Lacking ownership, South Carolina simply had an insufficient interest in (nexus with) the fish to invoke *McCready* as authority for an excessively discriminatory commercial fishing license fee which was 100 times higher for non-residents ($2500) than for residents ($25).[15]

[15]Mullaney v. Anderson, 342 U.S. 415 (1952) was another case involving a license differential between resident and

[footnote continued]

McCready simply was not applicable. The Court described the ownership theory as "a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource." *Id.*, at 402. *The ownership theory* – the common law doctrine recognized in *Geer* that title to *ferae naturae* is in the sovereign – was viewed in *Toomer* as a fiction. That analysis in no way limited the basic principle of *McCready* that the common property of the people, *i.e.*, the property actually owned by the state, may be used and distributed in a manner which will provide a benefit only to the people. As Mr. Justice Frankfurter noted in his separate concurring opinion:

> It is not conceivable that the framers of the Constitution meant to obliterate all special relations between a State and its citizens. This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.

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non-resident commercial fishermen. However, no mention of *McCready* is ever made in that decision in which the Court simply followed *Toomer* in holding the differential unconstitutional. Considering the *de minimus* difference in the license fees compared with that in *Toomer*, it appears the reason the differential was invalidated was the Territory of Alaska's failure to provide any evidence justifying it and not because the differential was excessive as in *Toomer*.

When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over their fisheries, and it is this common understanding that was reflected in *McCready v. Virginia*, 94 U.S. 391. The *McCready* case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the *McCready* doctrine as to the power of States to control their game and fisheries for the benefit of their own citizens, but in our own day this Court formulated the amplitude of the *McCready* doctrine by referring to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." *Truax v. Raich*, 239 U.S. 33, 39-40.

Id., at 407-409.

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), another case cited by appellants, rejected California's claim to ownership of the fish in its marginal sea as a sufficient basis for its discriminating against certain aliens who were residents of California in the issuance of commercial fishing licenses. While again describing the common law ownership theory as a fiction, the Court expressed no opinion as to the viability of the *McCready* principle (the privileges and immunities clause not being at issue), except to say "[t]hough the *McCready* case has been often distinguished, its rationale has been relied on in other cases, including *Geer v. Connecticut.*" *Takahashi*, at 421.

Douglas v. Seacoast Products, Inc., *supra*, decided by the Court just last May, is also relied on by the appellants. In that case the Court held a Virginia statute which prohibited non-residents from catching certain fish in Virginia waters to be pre-empted by federal law.[16] Virginia had attempted to counter the pre-emptive effect of the federal statute by arguing that it owned the fish in its territorial waters. The Court refused to recognize that fiction of ownership stating, "[a] State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals." *Id.*, at 319. Here again, what the Court rejected was the common law doctrine of sovereign ownership of *ferae naturae*. It did not address the *McCready* principle since the privileges and immunities clause was not at issue.[17]

Nothing in *Douglas* or any of the other cases cited by appellants undercuts the vitality and continued validity of the *McCready* principle. The essential

[16]The Court specifically pointed out that *McCready* was factually distinguishable because no claim under a preemptive act of Congress had been asserted in that case. *Id.*, at 320, n. 21. Mr. Justice Rehnquist, joined by Mr. Justice Powell, concurring in part and dissenting in part, also pointed out that *McCready's* validity was not being disputed. It appears that appellants' reliance on certain of the "patchwork of broader language" which the Court "embroidered" on its pre-emption holding in *Douglas* is just the sort of result of that language which Mr. Justice Rehnquist warned against in his separate opinion. *Id.*, at 321.

[17]By way of *dicta* the Court discussed in *Douglas* the implications of its holding on policy considerations relating to federalism, but the concern it addressed – the potential "Balkanization" of interstate commercial activity – is a commerce clause issue and is not a subject for the privileges and immunities clause. This latter clause is concerned with certain rights of individuals and not with interstate economic activity.

difference between *McCready* and each of the above-discussed cases is obvious. *McCready* involved Virginia's actual ownership of *land*, albeit under water.[18] On the other hand, all of these later cases which supposedly undercut the *McCready* decision involved fictional common law claims of ownership of wildlife[19] – and wildlife which *migrated* across state borders, at that. Stated another way, these other cases stand for the proposition that where title to the natural resource is questionable, at best, the state may not assert the speculative claim of "ownership" as a basis for discrimination against non-residents. The converse of that proposition is that where title to a natural resource is both clear and ascertainable that state may assert its clear claim of ownership, in fact, as the basis for discrimination in favor of its residents. As in *McCready*, Alaska's claim that it may provide an employment preference in the development of those natural resources to which it has title does not rest on such a "slender reed" as its fictional ownership of wild animals. Alaska's claim is as solid and real as the land on which the Trans-Alaska Pipeline is built.

[18]In this regard, Alaska's claim is even stronger. While a state holds title to its submerged lands under navigable waters and may dispose of its interest in that land, it may only do so in a manner which will not impair the public's interest in the waters and subject to the right of Congress to control navigation on the waters for the regulation of commerce. Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892). There is no similar restriction on Alaska's authority to dispose of the fast land to which it has title.

[19]It appears that this case is the first privileges and immunities case involving a state's regulating the distribution or use of *land* which it owns in favor of its residents to be decided by this Court since *McCready* in 1877.

Nothing in the cases cited by appellants limits, much less overrules, the continuing validity of what the dissenting justices of the Alaska Supreme Court referred to as "an antiquated line of authority." *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 23a; 565 P.2d at 171. We grant that the principle established in *McCready* dates back to the times in which our Constitution was written. However, the fact that it was first articulated so shortly after our Nation was founded is the basis for its strength and not for any present-day weakness. Our Nation now, as then, is still made up of individual states, each charged with the primary duty of caring for the welfare of its own people. The *McCready* "line" helps establish the scope of the States' authority to carry out that duty.

2. Local Hire is Within the Scope of McCready.

Appellants rely on a number of commerce clause cases in arguing that the *McCready* principle does not extend to employment which arises as a result of the State's regulating the use and development of the resources which it owns on behalf of its people. None of appellants' cases, however, stands for or even hints at such a proposition.

Certainly the State could not regulate the employment arising from the development of its resources in a manner which would interfere with interstate commerce in those resources, but appellants have never advanced such a claim. However, even if that claim had been raised, it has no likelihood of success. Local Hire places no restrictions on the exploitation, transportation or distribution of the natural resource. Further, the Act does not require the employment of any individual who is unqualified to perform the work, and it provides an

exception for the employment of key executive, professional and administrative personnel. AS 38.40.030(b). Certainly, there is nothing in the record even intimating any kind of interference with interstate commerce.

It is because Alaska Hire does not create (and is not claimed to create) any interference with interstate commerce in oil and gas that appellants' continued reliance on certain commerce clause decisions of this Court is simply misplaced. In each of those cases, *West v. Kansas Natural Gas, supra, Pennsylvania v. West Virginia, supra*, and *Foster Fountain Packing Company v. Haydel, supra*, a state had attempted to regulate, for its own advantage, the use and distribution of a natural resource at a point at which that resource had already become a product in interstate commerce. As pointed out *ante* at n. 2, in both *West* and *Pennsylvania* the states tried to base their authority to regulate the resource on the general assertion that it was the state's gas – not because the state had any ownership in the gas, in fact, but simply because the gas was extracted within the state's borders. In *Foster Fountain Packing* the State of Louisiana had a statute which declared that shrimp within its territorial waters were the property of the state and prohibited the shipment of any raw shrimp taken within the state. However, the state did permit the shipment of canned shrimp from the state. The effect of the Louisiana law, then, was to restrict, but not prohibit, the distribution in interstate commerce of shrimp after they had been reduced to possession by private persons. In holding the state's regulation of the shrimp industry unconstitutional under the commerce clause, the Court acknowledged that "[a]s the representative of its people, the state might have retained the shrimp for consumption

and use therein." *Id.*, at 13. However, the Court found that Louisiana had relinquished its hold over the shrimp by permitting it to be shipped in interstate commerce and, therefore, its authority to control the processing and distribution of the product had been terminated.

West, *Pennsylvania*, and *Foster Fountain Packing*, then, are wholly distinguishable from the case now before the Court. Those cases were decided on commerce clause grounds and involved state attempts to restrict the distribution of natural resources found within their borders.[20] They did not involve employment arising out of the development of state owned resources. Local Hire, on the other hand relates only to such employment and does not restrict in any way the use, distribution or exploitation of any oil and gas found in Alaska. Since they are so clearly distinguishable, appellants' cases provide no basis for overruling *McCready* or holding that Local Hire violates the privileges and immunities clause.[21]

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[20] In this regard, see also Doe v. Bolton, 410 U.S. 179 (1973), involving a privileges and immunities claim in which Georgia law provided that only state residents could obtain abortions in any hospital in Georgia. The residency requirement applied to both public and private hospitals in the state. It was on that basis that the requirement was struck as unconstitutional, the Court noting that it was "not based on any policy of preserving state-supported facilities for Georgia residents", *Id.*, at 200. This implies that a restriction of access to state-supported or state-funded hospitals might have been permissible.

[21] Edwards v. California, 314 U.S. 160 (1941), cited by appellants, also provides no basis for invalidating Local Hire. *Edwards* was a commerce clause decision which struck down as unconstitutional a California law making it a crime for a person to bring or transport other persons who were indigent non-residents into the state. A majority of the Court treated the

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Appellants have not cited any cases which address a state's authority to regulate employment generated from the exploitation, use, and distribution of natural resources which it owns. Alaska only requires that, in allocating a limited number of certain natural resources-related employment opportunities (which would not even exist except for the State's action in permitting development of these resources), employers must give an employment preference to qualified Alaskans. We believe that the authority to require such a preference, without erecting a barrier to any non-resident who wishes to travel to Alaska and without limiting in any way the use or distribution of the *product*, is a necessary and proper incident of the State's authority and duty to manage its resources for the "maximum enjoyment" of its people. This is certainly the implication contained in the Court's decision in *Truax*, supra. As is true of Local Hire, *Truax* involved state action seeking to affect the composition of the workforce in a portion of the private sector. However, unlike Local Hire, the action did not "pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens." *Id.*, at 39, 40.

Alaska Hire is wholly within the scope of the *McCready* principle. As such, the *McCready* "excep-

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law as a commerce clause issue because it penalized the *act* of transporting another across state lines – it did not penalize the indigent person who was transported. The Court pointed out the law's "express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and

[footnote continued]

tion," whatever its precise legal nature,[22] insulates Local Hire from attack under the privileges and immunities clause.[23]

B. Even If McCready Does Not State The Applicable Principle, Local Hire Still Satisfies The Privileges and Immunities Clause.

Even if the Court concluded that Local Hire is not within the *McCready* principle or overruled *McCready*,[24] that would not, as appellants suggest, determine the constitutionality of Local Hire under the privileges and immunities clause. Those who challenge the Act still must demonstrate that the law affects a "fundamental"

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immediate; it is the plain and sole function of the statute." *Id.*, at 174. The Court was not willing to permit California to shut its gates to the outside world in that fashion. *Edwards* is clearly distinguishable from the case now before the Court. Local Hire does not prohibit bringing anyone into the State; it merely provides for a preference in certain employment to residents. As such there is no basis for a commerce clause claim against the Act. The Alaska Supreme Court considered *Edwards* and found that the decision did not compel invalidation of Local Hire. *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 18a; 565 P.2d 169.

[22]See note 14, ante.

[23]Just as the Court concluded in Hughes v. Alexandria Scrap Corp., supra, that nothing in the commerce clause "forbids a state from, in the absence of Congressional action, participating in the market and exercising the right to favor its own citizens over others", *Id.*, at 810 (footnote omitted), so too, the privileges and immunities clause was not intended to forbid a state from exercising "the right to favor its own citizens over others" by requiring a preference for residents in employment in a job market which it has created.

[24]Presumably either holding would also apply to the various states' resident preference requirements for employment in activities arising out of public works contracts let by the states and their political subdivisions. See n. 4, *ante*.

privilege or immunity and that there are no valid reasons for the discrimination. Local Hire is constitutionally sound under both tests.

1. There is no Fundamental Privilege or Immunity at Issue in this Case.

A reading of appellants' brief fails to disclose precisely what fundamental privilege or immunity of the citizens of Alaska is denied to non-residents by Local Hire. By simple logic, though, it follows that the privilege at issue must be the hiring *preference* in certain State-generated employment where the number of jobs available is less than the number of applicants for them. Is this a fundamental privilege of Alaska citizenship? We think not. This employment preference does not involve a "disability of alienage" or the right to pass into Alaska for any purpose, to acquire real property, to maintain actions in the State's courts, or to be exempt from higher taxes or excises than those imposed on residents. It is not a basic civil right which the State must in some manner grant or recognize. The Legislature could repeal the preference tomorrow and no Court would support a claim by a resident that he had been deprived of a vested property right without due process of law.

Obviously the manner in which the employment preference under Local Hire is characterized could have a bearing on whether this Court will recognize it as "fundamental" for purposes of Article IV, Section 2, analysis. Unfortunately, appellants have failed to characterize it in any manner whatsoever. Presumably they will attempt to state it in their reply brief. If they do, our point is simply that articulation of any specific right or privilege is not, in itself, sufficient to establish

that it is "fundamental" for purposes of privileges and immunities analysis. Whether it is will depend upon how substantively important the Court views the claimed right to be.

2. Even if the Hiring Preference at Issue is a Fundamental Privilege or Immunity, Local Hire is Still Sound.

A finding that Local Hire denies non-residents a fundamental privilege or immunity enjoyed by Alaska residents still would not determine the Act's validity under the privileges and immunities clause. As the Court stated in *Toomer, supra:*

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the *many situations* where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the discrimination bears a close relation to them.

Id., p. 396 (footnote omitted, emphasis added). The Court went on to express the following caveat:

> The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Id.

These two passages, taken together, state the contemporary test for analyzing resident/non-resident

discriminations under the privileges and immunities clause. Appellants provide no argument or analysis on the test whatsoever, leaving it wholly to us to justify a law which is entitled to the presumption of constitutionality. *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). We will demonstrate that Local Hire withstands the scrutiny called for by *Toomer.*

The *Toomer* test is essentially two-pronged and may be restated as follows:

> 1. Are there valid independent reasons for the disparity of treatment?
>
> 2. Does the degree of discrimination bear a close relation to those reasons?

These two standards are to be considered in light of "the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.*, at 396.

We have devoted a substantial portion of this brief to demonstrating that there are valid independent reasons for the preference in oil and gas-related employment given to Alaska residents under Local Hire.[25] Stated briefly, they are to reduce the State's traditionally high rate of unemployment and develop its "human

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[25] As we pointed out *ante* at n. 9, the Alaska Supreme Court did not address the question of whether the State's asserted "independent reasons" were valid since it reached its decision by applying the *McCready* "exception" to Local Hire. Contrary to appellants' reading of the Alaska Court's decision, that Court did not reject any of those asserted "independent reasons". Their validity is a question of law which may properly be determined by this Court.

resources,"[26] to carry out to the fullest its duty to provide for the general welfare of its own people, and to effect its constitutional duty under Article VIII, Section 2 of the Alaska Constitution.

Local Hire is clearly not discrimination for discrimination's sake. Each of the reasons set out above arises out of considerations unrelated to any *animus* toward, or distrust or dislike of, non-residents. As such, they are "independent reasons" for the discrimination as that term is used in *Toomer*. Moreover, they are valid when viewed in light of the fact that the State has a direct ownership interest in the land and resources which generate the employment which is subject to the Act. The State *does* have a duty to use those resources in furtherance of the welfare of its people.

Unlike *Toomer*, where the degree of discrimination involved a license fee one hundred times higher for non-residents than residents, the degree of discrimination is minimal and is rationally related to the State's valid independent reasons. The discrimination involves only a preference in covered employment. It does not prohibit the hiring of non-residents,[27] and it does not bar non-residents from coming to Alaska. Further, it

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[26]See in this regard the following publications of the Federal Field Committee for Development Planning in Alaska:

a. "Economic Outlook for Alaska" (1971)

b. "Strategies for Economic Development in Alaska" (1971)

c. "A Subregional Economic Analysis of Alaska" (1968)

d. "Alaska Natives and the Land" (1968)

[27]Approximately one quarter of covered employment on the Trans-Alaska Pipeline was filled with non-residents. *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 11a.; 565 P.2d at 166.

does not require that unqualified residents be given the preference,[28] and it applies only to employment which is the result of State-granted oil and gas leases, pipeline rights-of-way, etc.[29] – there is a direct contractual nexus between the State and the covered employment. If there is more that the State must show to demonstrate the validity of Local Hire under the privileges and immunities clause, we are unable to perceive, without the benefit of any arguments on the matter from appellants, what it might be.[30]

[28]The State undertook a wide-ranging training program to qualify individuals for jobs on the Trans-Alaska Pipeline. *Op.*, Appendix to Appellants' Jurisdictional Statement, p. 11a; 565 P.2d at 164; Affidavits of Robert D. Booher, Robert M. Davis, and Gerald D. Hiley, R. 84-89 and 92-94.

[29]In June of 1976, the height of pipeline construction activity, Local Hire applied to only six percent of total employment in the state. Op., Appendix to Appellants' Jurisdictional Statement, p. 2a, n. 1; 565 P.2d at 161, n. 1.

[30]Consistent with our analysis, we believe it is clear from a reading of House Report 624 on H.R. 7999, the bill which became the Alaska Statehood Act, *supra*, that Congress fully intended to make Alaska "master in fact of most of the natural resources within its boundaries", 1958 U.S. Code, Cong. & Adm. News, at 2933-2934, so that the new state could tap its economic resources and manage them in the manner it considered most beneficial to the Alaskan people:

> The grant of statehood means the grant to the people of Alaska of the right to manage their own internal affairs and the right to send representatives to the Congress in Washington. It is therefore a measure in support of the principle of local government of local affairs, embodied in American legal philosophy under the concept of States rights. Behind the idea of States rights and local self-government lies the conviction that matters of local concern can best be determined and most efficiently managed by those most directly affected.

Id., at 2941. Local Hire was enacted in pursuance of the Congressional plan for Alaska. It does not violate the privileges and immunities clause.

IV.

LOCAL HIRE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellants also assert that Local Hire violates the equal protection clause of the 14th Amendment. They assert, first, that a classification which draws a line based on residence/non-residence is a "suspect classification." Secondly, they claim that Local Hire infringes upon the "fundamental right" of interstate travel, even though the one year durational requirement originally part of the Act was struck by the Alaska Supreme Court.[31] The argument is flawed in both cases.

A. Non-Residency Is Not A Suspect Classification.

Appellants suggested below, and do so again now, that non-residency should be declared a "suspect classification" as that term is used by this Court in determining which degree of judicial scrutiny should be applied to state action challenged under the equal protection clause. See, *e.g.*, *San Antonio Independent School District v. Rodriguez, supra.* By what might be best chatacterized as a bootstrap approach, appellants argue that, since alienage is a suspect classification (*Graham v. Richardson,* 403 U.S. 365 (1971)) and the privileges and immunities clause was adopted to protect citizens from the "disabilities of alienage" (*Lemmon v. People,* 20 N.Y. 607 (1806)), the degree of protection afforded aliens

[31]The Alaska Court did permit the State to impose a 30 day period for processing applications for residency cards and as an indicator of bona fide residence and intent to remain in Alaska. Appellants raise no challenge to this *de minimus* durational aspect, however.

under the 14th Amendment should also be provided to them.[32] This reasoning is circular and erroneous. "Alienage" was designated by this Court as a "suspect classification" in order to guarantee a state's *resident* aliens the equal protection of its laws as they applied to residents who were citizens; it has no reference to aliens who are non-residents.

In making their argument, appellants overlook three crucial and distinguishing factors. First, unlike aliens, the rights of non-residents (citizens of any other state) are already protected by two provisions of the United States Constitution. Those provisions are the privileges and immunities clauses of Article IV, Section 2 and the 14th Amendment.[33] It is true that the privileges and immunities clauses do make a classification based on non-residency (being a citizen of another state) "suspect" for purposes of bringing the judicial scrutiny called for by those clauses into play. However, that is

[32]The Alaska Court rejected this contention by pointing out that:

> Alienage most obviously differs from non-residence in a state because of the difficult and time consuming process required to become a U.S. citizen, as opposed to the ease with which a person can change his residence to a new state. In addition, the plenary power of the political branches of the federal government to exclude and control aliens has no equivalent in the state government, which cannot similarly exclude or control U.S. citizens resident in other states.

Op., Appendix to Appellants' Jurisdictional Statement, p. 14a; 565 P.2d at 167.

[33]One of those protecting clauses has consumed the major position of this brief. Neither of those clauses is available to an alien – a non-citizen.

an entirely different matter from saying that such a classification is "suspect" for purposes of *equal protection* analysis under the 14th Amendment.[34] The first proposition is self-evident; the latter has no basis in legal reasoning.

The second distinguishing factor arises from the setting in which this Court's cases finding alienage to be a "suspect classification" arose. Each of those cases involved discriminations based on alienage and state residency *combined.* The aliens against whom the discriminatory state action operated were not simply traveling through a state on their way to or from their home in another state or country. They were residents of the state which was denying to them certain benefits that it extended to those of its residents who were citizens. The Court held that a discrimination by a state *between classes of its residents* based on alienage could only be permitted upon a clear showing that it was necessary to promote a compelling state interest.[35] But that principle provides no platform for the leap of logic made by appellants. Alienage was designated a "suspect classification" because the states were treating their alien residents differently than their residents who were citizens. Appellants, however, would have the "suspect classification" analysis applied to non-residents *because* it is applied to certain residents. The logic of this approach is baffling. The necessary outcome of

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[34]This highlights the same analytical difficulty arising out of different useages of the term "fundamental right" discussed *ante* at n. 12 and of the notion of a "right to interstate travel" discussed *post.*

[35]Sugarman v. Dougall, *supra* (civil service); Graham v. Richardson, 403 U.S. 365 (1971) (welfare); Takahashi v. Fish and Game Commission, *supra* (commercial fishing); C.D.R. Enterprises, Ltd. v. Board of Education, *supra,* (public contracts).

appellants' approach is that non-residents should be treated like residents. This simply makes no sense: a resident who is also an alien is still a resident, but a resident who is also a non-resident is a *non-sequitur.*[36]

Third, the central purpose of the 14th Amendment's equal protection clause was the prevention of official conduct discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229 (1976); *Ham v. South Carolina*, 409 U.S. 524 (1973). Its scope has been extended by the Court over the years to protect a limited number of other classifications that, "at least in some settings, are also 'suspect' – for example, those based upon national origin, alienage, indigency, or illegitimacy." *San Antonio Independent School District, supra,* Stewart, J., concurring, at 61 (footnote omitted). These classifications have been designated "suspect" because they have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*, at 28. However, in recognizing the validity of numerous state discrimina-

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[36]This analysis points out the fallacy in appellants' assertion, at p. 43 of their brief, that:

> Indeed, if Alaska Hire is valid, Alaska may discriminate against Washingtonians or Oregonians but not Canadians.

A Canadian who is not a resident of Alaska is not a member of a suspect class for purposes of analyzing the application of Local Hire to him. Under the equal protection clause, he stands on the same footing as the non-residents from Washington and Oregon. On the other hand, if each of them took up residence in Alaska becoming, respectively, an Alaskan from Canada, an Alaskan from Washington, and an Alaskan from Oregon, they would each get the Act's employment preference.

tions based on residence,[37] this Court has never held non-residency to be such a class. As we have already pointed out, the privileges and immunities clauses of our Constitution assure that non-residents (citizens of other states) are not saddled with disabilities. Further, unlike aliens, they have full access to our Nation's political process through the election in their own states of representatives to Congress.[38]

There is no basis for designating non-residency a "suspect classification."

B. Local Hire Does Not Interfere With The Right Of Interstate Travel.

As a final argument, appellants assert that Local Hire should receive this Court's strict scrutiny because it interferes with a non-resident's right to travel interstate. Their argument is based on a line of cases decided by this Court which involved challenges to state-imposed *durational residency* requirements for the receipt of certain state-provided benefits. [39] Unlike the case

[37]See for example, n. 35, and McCarthy v. Philadelphia Civil Service Commission, supra (public employment); Sosna v. Iowa, 419 U.S. 393 (1975) (filing divorce actions in state court); Memorial Hospital v. Maricopa County, supra (free non-emergency medical care); Vlandis v. Kline, 412 U.S. 441 (1973) (preferential university tuition rates); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits).

[38]Presumably Congress could designate discrimination on the basis of residence as an unlawful employment practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2. Such a step would effectively pre-empt Local Hire and other state imposed preferences for residents in employment arising out of public construction and procurement contracts. See n. 4, *ante*.

[39]Shapiro v. Thompson, supra (welfare); Graham v. Richardson, supra (welfare); Dunn v. Blumstein, supra, (voting); Memorial Hospital v. Maricopa County, supra, (free non-emergency medical care); Sosna v. Iowa, supra, (filing divorce actions in state court).

now before the Court each of those cases involved state attempts to discriminate between classes of its *residents* – "long-time residents" (those who had been residents for a minimum specified duration – usually one year) and "new residents" (those residents who did not satisfy that durational requirement). In analyzing those distinctions, the Court held that a state could not condition access by its residents to certain "necessities of life," *Shapiro, supra*, on the basis of the length of time they had resided in the state. In the Court's view, such distinctions operated to penalize new residents for exercising their right to interstate migration and could only be justified by a demonstration that the requirement was necessary to promote a "compelling state interest". [40]

[40]We argued to the Alaska Court that Local Hire's employment preference did not involve a basic "necessity of life" and that, therefore, the Act's original one-year durational requirement was not a penalty on the exercise of the right to interstate travel. The Court rejected our position, stating in effect that durational requirements were *per se* penalties on that right and refusing to apply the "basic necessities" inquiry. It then held that Local Hire's one-year durational requirement violated the equal protection clauses of *both* the federal and state constitutions.

The equal protection clause of the Alaska Constitution was interpreted by the State's highest Court as requiring strict scrutiny of all durational requirements without any inquiry as to whether they relate to a basic necessity of life and actually penalize the right to migrate. The effect of that holding was to invalidate the one-year durational requirement, and that holding is not appealable to this Court. However, we believe that the Alaska Court erred by also invalidating the durational requirement under the federal equal protection clause without first making the "basic necessities" inquiry. Had it done so, we believe the Alaska Court would have concluded that the durational requirement was valid under the United States Constitution.

Local Hire does not discriminate between classes of residents.[41] It discriminates between residents and non-residents. This obvious distinction between the cases relied on by the appellants and Local Hire renders those cases inapposite. Appellants have not cited any cases calling for strict scrutiny in analyzing resident/non-resident classifications; there simply are none. Moreover, as we pointed out earlier, this Court has recognized the validity of numerous discriminations based on residence.[42]

Appellants' desire to have the Court apply strict scrutiny to Local Hire's resident/non-resident classification appears to arise from a misunderstanding of the nature of the "right to interstate travel" dealt with by the Court in its durational residency cases. The Constitution recognizes at least two different rights to travel. These are the right to travel casually and the right to migrate. It is clear from reading the durational residency cases that the right to travel addressed by the Court in them was not simply the right to travel casually, *i.e.*, to move about the country on vacation or business, to travel to college in another state, or to visit the seat of government. While this right to move about is surely protected by our Constitution as well, it is not that right of travel which the Court has recognized as "fundamental" for purposes of equal protection analysis.

The right of travel which is "fundamental" under the equal protection clause of the 14th Amendment is the

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[41]We pointed out earlier, in n. 31, that the Alaska Supreme Court did permit the State to apply a *de minimus* 30 day durational requirement. Appellants have not directed any challenge to that requirement, however.

[42]See n. 37.

right of a person to move his residence (domicile) from one state to another without interference from either state. The Court usually refers to it as "the right to migrate":

> . . . the right of interstate travel must be seen as insuring *new residents* the same right to vital government benefits and privileges in the States to which they *migrate* as are enjoyed by other residents. The State of Arizona's durational residency requirement for free medical care penalizes indigents for exercising their *right to migrate to and settle in* that State. (footnote omitted) (emphasis added)

Memorial Hospital v. Maricopa County, *supra*, at 261-262. Although the Court has used the terms "right to travel," "right to interstate travel" and "right to migrate" interchangeably in its decisions recognizing the right as "fundamental" for purposes of equal protection analysis, it is clear that the right contemplated in those decisions looks only to a person's desire "to migrate, resettle, find a new job, and start a new life." *Shapiro*, *supra*, at 629. The right addressed in those cases does not encompass the more general right of an individual simply to move about the country while maintaining one *locus* as his place of residence or domicile.

Unlike discriminations between classes of residents which burden the right to migrate, the right to move about or to travel casually requires no special guarantees under the equal protection clause. It is already recognized and protected under the privileges and immunities clause of Article IV, Section 2 of the Constitution.[43] Among the rights considered "funda-

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[43]The right to move about may also be an incident of National citizenship protected under the privileges and immuni-

[footnote continued]

mental" under that clause[44] by Mr. Justice Bushrod Washington in *Corfield v. Coryell, supra*, was "the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Id.*, 381, 6 F. Cas. 551-552.[45] The right to travel under Article IV, Section 2 has been described by this Court as "the right of free ingress into other states, and egress from them," *Paul v. Virginia, supra*, and "the right of the citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade or business," *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871). Local Hire imposes absolutely no barrier, limit or restriction on any individual's right to travel casually to or through Alaska for any purpose. Nor does it place

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ties clause of the 14th Amendment. See, generally, the concurring opinion of Mr. Justice Douglas in Edwards v. California, *supra*, at 177-181. However, since that right was clearly protected under Article IV, Section 2 at the time the 14th Amendment was adopted, it seems questionable that the Amendment was intended to encompass it. The better analysis may be to say that the right to move about arises out of Article IV, Section 2 and that the right to migrate arises out of the privileges and immunities clause of the 14th Amendment, since Article IV, Section 2 had no application to a state's newly arrived residents (citizens). But no matter how the privileges and immunities clause of the 14th Amendment relates to the right to move about and the right to migrate, Local Hire imposes no limit, restriction, or barrier on either of them. Appellants have never challenged Local Hire on the basis of that clause.

[44]See our discussion of the different useages of the term "fundamental right", *ante*, n. 12.

[45]Mr. Justice Washington's reference to the "right to reside" obviously refers to an individual taking up residence in the narrow legal sense while maintaining his domicile elsewhere. The Alaska Supreme Court held that the definition of resident for purposes of Local Hire is domicile-based. *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 20a-21a; 565 P.2d at 170, 171.

a burden on the right to migrate – if anything it creates an incentive to move to Alaska. As such, there is no basis for submitting Local Hire to the "strict scrutiny" test.[46]

C. Local Hire Clearly Satisfies The Rational Basis Test.

Since strict scrutiny is not the applicable equal protection test for determining the validity of Local Hire, the question becomes whether, affording the statute the presumption of validity to which it is entitled, *McGowan v. Maryland, supra*, the Act is rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). The Court has expressly stated that this is the test which "has consistently been applied to state legislation restricting the availability of employment opportunities." *Dandridge v. Williams*, 397 U.S. 471, 483 (1970).

Appellants make absolutely no assertion that Local Hire does not satisfy this lower level of the Court's

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[46]Local Hire would withstand strict scrutiny even if subjected to it. As we noted *ante*, n. 9, the Alaska Supreme Court has held that Alaska's interest in "reducing unemployment and 'upgrading Alaska's human resources'" is a compelling governmental interest. Local Hire imposes no erroneous durational requirement, and it is exactly tailored to accomplish the State's purpose – the employment of Alaska residents and a general improvement in the social and economic condition of the Alaska people. Suggestions that Local Hire should be limited to unemployed Alaskans are too restrictive for promoting the State's interests. While Alaska does have a high unemployment rate, many Alaskans are simply underemployed; they work in jobs below their full work potential. Many others are employed in jobs which are only seasonal in nature. Further, the goal of upgrading Alaska's human resources is not limited to just her unemployed human resources.

two-tier equal protection test. They apparently concede that it does, and we think we have already more than adequately demonstrated that it does throughout our preceding analysis. In any event, appellants have the burden of showing that the Act does not meet the test. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79 (1911). They have not undertaken any effort to do so.

V.

THE STATE'S POWER TO MAKE CONTRACTS IS AN INDEPENDENT BASIS FOR THE VALIDITY OF LOCAL HIRE.

As an alternative basis for upholding Local Hire, we suggested to the Alaska Supreme Court that the validity of actions taken by the State in the exercise of its contracting power as proprietor of certain resources should be measured by the same standards as those applicable to private persons making the same contracts.[47] The Alaska Court rejected this argument, by way of footnote,[48] as it applied to the one-year durational residency requirement originally contained in the Act. As a matter of sound judicial policy and governmental law, governments probably should not be able to effect discriminations which are wholly invidious in nature through exercise of their contract power. However, saying that much does not resolve the underlying question of whether a state may ever use its

[47] City of Oakland v. Burns, 296 P.2d 333 (Cal., 1956):

> . . . when a governmental entity is authorized to exercise a power purely proprietary, the law leans to the theory that it has full power to perform it in the same efficient manner as a private person would. (citation omitted), at 337.

[48] *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 9a-10a, n. 10; 565 P.2d at 165, n. 10.

power to make contracts free of traditional constitutional scrutiny.[49]

AS 38.40.030(a) provides, in pertinent part, as follows:

> In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources *shall incorporate* into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party *provisions requiring the lessee* to comply with applicable laws and regulations with regard to hire of Alaska residents. The commissioner *shall include a provision requiring the hiring of qualified Alaska residents*. . . . (emphasis added)

Through this provision the State exercised its authority, pursuant to its contracting power, to establish the conditions under which leases, etc. of certain of the natural resources owned by it would be made. Viewed in this light, it becomes apparent that Local Hire merely serves to instruct the State's executive branch to fix certain terms and conditions under which it may make oil and gas leases and establishes remedies and procedures for enforcement upon a breach of those terms and conditions.

In making gas and oil leases and setting their terms, the State does not exercise its police power "to regulate or license, as lawmaker, an entire trade or profession, or

[49] The cases relied upon by the Alaska Court in rejecting our power of contract argument all involved state supported discriminations along the lines of race. Further, the cases were not really in point because none of them involved a state's making contracts to dispose of its resources.

to control an entire branch of private business, but rather, as proprietor, to manage [its] internal operation(s)," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896, 6 L.Ed. 1230 (1961). While there is no question that the favoring of one class over another by legislation enacted by a state solely on the basis of its general police powers must satisfy scrutiny under applicable provisions of our Constitution, it is not clear that actions by the states in the exercise of their contract powers – more specifically the power to acquire and dispose of property – must also be subjected to that scrutiny. With respect to the powers of the federal government, this Court held, in 1940, that it, "[l]ike private individuals and businesses, . . . enjoys the *unrestricted power* . . . to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (emphasis added). The Court appears to have acknowledged the validity of this proposition as it applies to the states by affirming *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (D.M.D. Fla., 1972), *aff'd mem.*, 409 U.S. 904 (1972).

The employment which is subject to Local Hire is employment which would not exist but for the State's acting to lease certain of the resources and land which it owns. It appears that a meaningful parallel may be drawn between what Alaska has done by way of Local Hire and the state action dealt with in this Court's recent decision in *Hughes v. Alexandria Scrap Corp.*, *supra*. In that case, the State of Maryland, as purchaser, created a new market for automobile hulks and in implementing the program provided certain advantages to resident scrap processors that were not available to non-resident processors. In response to a commerce

clause challenge by a non-resident processor, the Court held that there was nothing in the commerce clause to prohibit a state, "in the absence of Congressional action, from participating in the market and exercising *the right to favor its own citizens* over others." *Id.*, p. 80 (emphasis added, footnote omitted).[50] If a state may, as a purchaser, involve itself in the abandoned hulk market in a manner favoring residents, it seems that it must also have the authority, as a lessor, to involve itself in an employment market which arises as a result of the lease in a manner which favors its residents.

Except, perhaps, for cases involving invidious discriminations, we suggest that the standard for measuring the validity of the State's exercise of its power as proprietor of certain resources is the same as that applicable to private persons making the same contracts. Since Local Hire is not violative of any statutes applicable to private contractors prohibiting discrimination against non-residents, this Court should uphold the Act as being a proper exercise of the State's power to make contracts and fix their terms and conditions.

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[50]Appellants have never asserted that Local Hire is pre-empted by federal law. It is not. Sec. 401 of the Trans-Alaska Pipeline Authorization Act, P.L. 93-153, 87 Stat. 576, provides in pertinent part as follows:

CIVIL RIGHTS

> Sec. 403. The Secretary of the Interior shall take such affirmative action as he deems necessary to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from receiving, or participating in any activity conducted under, any permit, right-of-way, public land order, or other Federal authorization granted or issued under Title II.

It makes no mention of discrimination on the basis of residence. See also 42 U.S.C. 2000e-2.

VI.

NEW CLAIMS RAISED BY AMICI ARE NOT PROPERLY BEFORE THE COURT, BUT EVEN IF THEY WERE, THEY LACK BOTH SUBSTANCE AND SUPPORT IN THE RECORD.

As we pointed out in our objections to the briefs of the National Right to Work Legal Defense Foundation and Peabody Testing-Bill Miller X-Ray, Inc., the various challenges to Local Hire raised by them but never presented to the lower Courts may not properly be presented to this Court. *Walters v. St. Louis*, 347 U.S. 231, 233 (1954). But even if these claims could be raised now, they simply lack substance as applied to Local Hire and are without factual support in the record. We have already made reference to the commerce clause claims and, beyond a brief mention of two others, we do not intend to address them further.

A. Local Hire Does Not Constitute Slavery Or Involuntary Servitude.

In an interesting and historically enlightening discourse on the nature and scope of the 13th Amendment to the Constitution, the National Legal Right to Work Defense Foundation urges the conclusion that Local Hire is invalid because it imposes a condition of slavery or involuntary servitude in violation of that amendment.

We do not doubt that it is for this Court to decide the meaning of the words "slavery" and "involuntary servitude," but, in the words of Mr. Justice Field speaking of the scope of the 13th Amendment in the *Slaughterhouse Cases, supra:*

> To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government – a declaration designed to establish the freedom of four million of slaves – and with a microscopic search endeavored to find in it a reference to servitudes, [which prohibits states from limiting the availability of employment opportunities], requires an effort, to say the least of it.

Id. at 406. We are not cited to any cases defining "slavery" or "involuntary servitude" so broadly as to make them even arguably applicable to state created resident employment preferences such as Local Hire or the similar preferences established by numerous states in employment arising out of various public contracts. See n. 4, *ante*. We find it difficult to believe that the 13th Amendment was intended to prohibit state action of that nature.

B. Local Hire Is Not Pre-Empted By The NLRA.

The brief of Peabody Testing-Bill Miller X-Ray, Inc. suggested a novel pre-emption theory based on an asserted conflict between Local Hire and the National Labor Relations Act (NLRA) 29 U.S.C. 151 et seq. That claim, too, was never advanced at any stage of the proceedings in the lower courts.[51]

Beyond the fact that not all oil and gas-related employment is unionized and is therefore not governed by the NLRA, there simply is no conflict between the NLRA and Local Hire or the way in which it has been enforced, and there is nothing in the factual record to

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[51] This is simply an inappropriate forum for Peabody-Miller to raise its defenses to the State of Alaska's efforts to enforce Local Hire.

support such a finding.[52] Had such a claim been properly raised at the trial court level, we would have shown that no such conflict exists by establishing at least the following facts: that both unions and management freely agreed to carry out their hiring procedures in accordance with Local Hire; that the Office of the General Counsel to the National Labor Relations Board has issued an opinion stating that unions may, consistent with the NLRA, establish dispatch procedures which are in accord with Local Hire; that union contracts covering work subject to Local Hire did not provide for a lay off procedure which was inconsistent with Local Hire; and that, with respect to Peabody-Miller, the union representing its X-ray technicians *sought* to dispatch Alaska residents to that employer, but Peabody-Miller refused to accept them. Further argument before the Court on this issue is unnecessary and probably inappropriate.

CONCLUSION

Based on the foregoing, we believe it clear that Local Hire is fully consonant with the Constitution and that the decision of the Alaska Supreme Court should be affirmed. As stated by the Alaska Court, the Act "gives the state's benefits to those who bear its burdens, without placing any limitation on who may voluntarily assume those benefits and burdens." *Op.*, Appendix I, Appellants' Jurisdictional Statement, p. 18a; 565 P.2d

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[52]If Local Hire conflicts with the NLRA *on its face*, then so do the requirements imposed by various states for preferential employment of residents in work arising out of public construction and/or procurement contracts let by them and their political subdivisions. See n. 4, *ante*.

at 169. If a state may not do this much for its own people, we wonder for what reason our system of federalism exists.

RESPECTFULLY SUBMITTED at Juneau, Alaska this day of February, 1978.

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